(18,865.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 235.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS AND CLARENCE C. FROST.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1903.

1 United States Circuit Court of Appeals, Second Circuit.

Before Wallace, Lacombe, and Coxe, circuit judges.

ANDREW J. DAVIS, Plaintiff in Error,
vs.
HIRAM R. MILLS and CLARENCE C. FROST, Defendants in Error.

Certification of Question to the Supreme Court under the Act of March 3, 1891.

This cause came before this court at the October term of 1902 upon a writ of error sued out by the plaintiff below to review a judgment of the U. S. circuit court, district of Connecticut dismissing the complaint on the merits. As to all of the questions presented by the writ of error this court has reached a conclusion, except as to a question of law upon which it desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

The plaintiff is a citizen of Montana and the owner by assignment of three causes of action (for goods sold and on a promissory note) against the Obelisk Mining and Concentrating Company, a Montana corporation. The indebtedness of the company
2 upon these causes of action accrued July 31, 1892, July 1, 1892 and December 12, 1892 respectively. The defendants are and always have been citizens and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company. The statutes of Montana provide that within twenty days from the first day of September every such company shall annually file a specified report, and that if it "shall fail to do so, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." Section 460 of chapter 25 of the fifth division Compiled Statute- of Montana which was in force when the cause of action arose. Reenacted as section 451 of the Civil Code of Montana, which went into effect July 1, 1895.

The Obelisk Company failed to file certain of the required reports and the causes of action sued upon here, against the defendants as trustees to recover debts of the company, accrued September 22, 1893, or prior thereto. This action was brought to enforce the joint and several liability of the defendants under the statute on July 30, 1897.

When the cause of action accrued the Compiled Statutes of Montana contained these sections.

"SEC. 45. 1. In an action for a penalty or forfeiture, when the "action is given to an individual, or to an individual and the Ter-

"ritory, except where the statute imposing it prescribes a different "limitation; 2, an action against a sheriff or other officer for the "escape of a prisoner arrested or imprisoned on civil process shall "be commenced within one year."

3 "SEC. 50. If when the cause of action shall accrue against "a person he is out of the Territory, the action may be com- "menced within the time herein limited, after his return to the Ter- "ritory; and if after the cause of action shall have accrued he depart "from this Territory, the time of his absence shall not be a part of "the time limited for the commencement of the action."

Both of those sections were repealed by the Code of Civil Proceedure section 3482 which went into effect July 1, 1895. On the last-named date the Civil Code of Montana went into effect containing section 451 above cited. The Code of Civil Proceedure contains a separate title, numbered II and containing four chapters (sections 470 to 559), which deals exhaustively with "the time of commencing actions." It contains these sections:

"SECTION 515. Within two years:

1. An action upon a statute for a penalty or forfeiture, "when the "action is given to an individual, or to an individual and the State, "except when the statute imposing it prescribes a different limitation."

"SECTION 541. If, when the cause of action accrues against a per- "son, he is out of the State, the action may be commenced within "the term herein limited, after his return to the State, and if, after "the cause of action accrues, he departs from the State, the time of "his absence is not part of the time limited for the commencement "of the action."

"SECTION 554. This title does not affect actions against directors "or stockholders of a corporation, to recover a penalty or

4 "forfeiture imposed, or to enforce a liability created by law; "but such actions must be brought within three years after "the discovery by the aggrieved party of the facts upon which the "penalty of forfeiture attached or the liability created (*sic*)."

Question Certified.

Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court, for its proper decision, is:

"May a defendant in an action of the kind specified in section 554 of the Code of Civil Proceedure of Montana, avail of the limitation therein prescribed, when the action is brought against him in the court of another State?"

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal etc., the foregoing question of

law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

February 25, 1903.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

5 [Endorsed:] United States circuit court of appeals, second circuit. Andrew J. Davis, pl'ff in error, *vs.* Hiram R. Mills and Clarence C. Frost, def'ts in error. Certification of question to the Supreme Court. United States circuit court of appeals, second circuit. Filed Feb. 25 1903 William Parkin, clerk.

6 UNITED STATES OF AMERICA, }
Southern District of New York. }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit do hereby certify that the foregoing certificate was filed and entered of record in this office on the 25th day of February, one thousand nine hundred and three, and, as directed by the judges of said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, February 27th, 1903.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

7 [Endorsed:] United States circuit court of appeals, second circuit. Andrew J. Davis *v.* Hiram R. Mills & an'r. Certificate.

8 At a stated term of the United States circuit court of appeals for the second circuit, held at the court rooms in the post office building, city of New York on the 16th day of March, 1902.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, judges.

ANDREW J. DAVIS, Plaintiff in Error, }
vs. }
HIRAM R. MILLS and CLARENCE C. FROST, Defendants in Error. }

A motion having been made to amend the statement of facts in the certification of question herein to the Supreme Court,

It is ordered that the statement of facts be amended by inserting after the words "the defendants are and always have been citizens

and residents of Connecticut, and at all the times mentioned in the complaint were trustees of the said Obelisk Mining Company" the words "and none of them has been in Montana at any time since 1890."

It is further ordered that a certified copy of this order be transmitted to the clerk of the Supreme Court of the United States to be annexed to the original certificate.

A true copy.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

WM. J. WALLACE.
E. HENRY LACOMBE.
ALFRED C. COXE.

9 [Endorsed:] United States circuit court of appeals, second circuit. Andrew J. Davis *v.* Hiram R. Mills. (Copy.) Order.

10 [Endorsed:] File No. 18,865. Supreme Court U. S., October term, 1903 Term No. 235 Andrew J. Davis *vs.* Hiram R. Mills. Certified copy of order amending statement of facts. Filed March 21", 1903.

Endorsed on cover: File No. 18,865. U. S. circuit court of appeals, second circuit. Term No. 235. Andrew J. Davis *vs.* Hiram R. Mills and Clarence C. Frost. (Certificate.) Filed March 14, 1903.